

EBENEZER LOBDELL.

[To accompany bill H. R. No. 30.]

FEBRUARY 29, 1840.

Mr. RUSSELL, from the Committee of Claims, made the following

REPORT :

The Committee of Claims, to whom was referred the memorial of Ebenezer Lobdell, make the following report :

This claim has been frequently presented for the consideration of Congress, and in each branch has received their favorable consideration ; and in the House of Representatives was referred to the Committee of Claims at the second session of the 25th Congress, when the annexed report was made thereon, which the committee adopt as a part of this report, and with it introduce a bill for the petitioner's relief.

JANUARY 9, 1838.

The Committee of Claims, to whom was referred the petition of Ebenezer Lobdell, praying compensation for improving the navigation of the Kennebeck river, at Lovejoy's narrows, in the State of Maine, over and above the contract price, report :

The petitioner states, that on the 30th of May, 1829, he entered into a written contract with Peter Grant, Esq., agent of the United States, to remove a certain "sunken rock," so called, in Kennebeck river, at Lovejoy's narrows, in the State of Maine ; that, by said contract, the petitioner bound himself "to remove the same, so that there should not be less than ten feet of water at the lowest low water in the summer season over said rock," in consideration of one thousand five hundred dollars to be paid him therefor.

That, before he entered into said contract, he made diligent inquiry of those persons most likely to know the lowest state of the river in summer ; and also sounded on and around said sunken rock, and supposed he ascertained to a certainty *the lateral extent thereof*, and, within a reasonable degree of certainty, the depth to which he would have to reduce the same. Fully relying on the accuracy of the information thus obtained, he entered into the contract, and commenced the removal of the rock, and reduced that which was in the contemplation of the parties at the time the contract was made, agreeably to the strict letter thereof.

Blair & Rives, printers.

That the water in the Kennebeck river, in the summer of 1829, was one foot lower than it was *ever* known to have been before that time, occasioned by the unprecedented drought that year; the effect of which was to compel the petitioner to reduce the rock one foot lower than what was contemplated by either party at the time the contract was executed. This the petitioner alleges he has done, and for it he asks no increased compensation.

The further effect of the drought was to bring to view large masses or fragments of broken rock *never before discovered or known to exist*, and lying remote from the sunken rock or ledge, but which were supposed to have been parts of it, but separated at some unknown former period of time. Mr. Grant, the Government agent, insisted that the petitioner was bound, by the terms of the contract, to remove these newly-discovered rocks. But the petitioner insisted that he was under no such obligation; but, upon the assurance of the said agent that the petitioner would be justly entitled, and might reasonably expect, to receive from the Government a just equivalent for his services and expenses in removing these fragments or rocks, over and above the amount of the contract, he proceeded, under the direction and advice of the said Grant, to remove the said fragments, which was accomplished at an increased expense of one thousand and seventy-five dollars and thirty-nine cents. And the first question which is presented for consideration is, Was the petitioner bound to remove these newly-discovered fragments, according to the legal interpretation of his contract?

2d. If their removal was not required by the contract, then does the reference to Mr. Swan, as hereinafter stated, form any objection to the relief prayed for?

This petition bears date on the 8th of January, 1830; and on the 16th of January, the agent, Peter Grant, subscribed, at the bottom of the petition, a certificate in the following words:

HALLOWELL, *January 16, 1830.*

Having examined the foregoing petition of Ebenezer Lobdell, I agree to all the statements therein mentioned, except the word *ever*, alluding to the tide not ebbing so low by one foot. I am of opinion that the water in Kennebeck river has been as low since forty years, but I have no exact data, only from recollection; but there is no doubt in my mind that it was at least full one foot lower in the summer and fall of 1829, than either of the parties to the contract contemplated it would be, from the best information obtained when the examination was had in August, 1827, upon which the contract was predicated; and Mr. Lobdell is entitled, in equity, to his bill for removing the detached parts.

PETER GRANT,

Superintendent at Lovejoy's narrows, K. river.

Accompanying this petition is the written contract referred to in it; and, on examination, it will be found to contain the three several stipulations hereinafter referred to.

1st. The petitioner agrees to "remove the half-tide rock, and the sunken rock, (so called,) lying in Lovejoy's narrows, in the Kennebeck river, below the two dry ledges, *with all their parts and fragments*; so that there shall *not be less than ten feet of water* at the lowest low tide in the summer season over either of said rocks."

2d. "And the said E. Lobdell further covenants, that he will remove all parts and fragments which *he* may detach from the half-tide rock, out of said Lovejoy's narrows, and that he will not leave any fragment of either rock which may *be detached by him* in any place in said river where vessels do or are liable to anchor, and where there is *not ten feet water* at the lowest low water in the summer season."

3d. The parties mutually further covenanted, "that if any question or dispute concerning the premises should arise between them, during the progress of the work, or at its completion, the same shall be referred to, and decided by, said Swan, (Edward Swan,) the umpire mutually chosen, whose decision shall be final."

During the progress of the improvement, and after the detached pieces or fragments of rock were discovered, a dispute arose between the agent and the petitioner, whether the petitioner was bound by the contract to remove those detached pieces or fragments of rock, not known to exist at the time the contract was entered into, and their removal of course not then contemplated by the parties, and which were at least ten feet below the surface of the water at the lowest tide in said Kennebeck river in the summer season, and at a distance from said sunken rock. This dispute was submitted, under the third stipulation above referred to, for the decision of said umpire, Edward Swan, who decided that "as said fragments or rocks were originally parts of said sunken rock, by the terms of the contract the petitioner was required, according to law, to remove them; but in equity the petitioner was entitled to a reasonable compensation for their removal." In a communication made by Mr. Swan, on the 16th January, 1830, on the subject of this claim, he says:

"1st. In his opinion, the Kennebeck river, in the summer of 1829, was several inches lower than usual at that season of the year."

"2d. That the sunken rock which was removed by said Lobdell had detached parts, which were separated from the main rock by *sufficient* depth of water, and which detached parts were removed by said Lobdell."

"3d. That he (Swan) was not aware of any such detached parts at the time the contract was made."

"4th. That he (Swan) has no particular knowledge of the expense of removing said detached parts of said rock, but has no reason to doubt the statement of the petitioner, that he has expended in that improvement one thousand and seventy-five dollars and thirty-nine cents; and is of the opinion that the petitioner has an equitable claim on the Government for the same."

The depositions of Jonathan Blanchard and twelve other individuals were referred, and are herewith submitted, and, in the opinion of the committee, establish the following propositions:

"1st. That the existence of the fragments of rock, or rocks, for the removal of which this claim was interposed, was not known to the contracting parties at the time the contract of the 30th of May, 1829, was entered into; and that their removal did not enter into the consideration for which the \$1,500 mentioned in the contract was stipulated to be paid."

"2d. That the petitioner removed the said fragments or rocks from the said river, at the request and under the direction of Peter Grant, Esq., the accredited agent of the Government under the claim; however, that their removal was provided for by the contract of the 30th May, 1829."

"3d. That the amount disbursed in the removal of said fragments or rocks, including the time of the petitioner and materials provided and used for the purpose, was \$1,075 39."

On the 1st of February, 1830, this claim was presented to Congress, and referred in the Senate of the United States to the Committee of Claims, which on the 14th of January, 1831, made a report thereon in favor of petitioner, and introduced a bill for his relief, which at that session passed that body and was sent to the House of Representatives for their concurrence; which bill was taken up in the House on the 25th of the same month, read a first and second time, and referred; and on the 2d of March following, Mr. McIntire, from the Committee of Claims, made a verbal report recommending that the said bill be rejected: whereupon said bill was ordered to be committed to the Committee of the Whole House, but no further action at that session appears to have been had thereon.

At the 1st session of the 23d Congress, Mr. Sprague, of the Senate, asked and obtained leave to introduce a bill for the relief of the petitioner, which was, on the 24th of December, 1833, read twice by unanimous consent, as in Committee of the Whole, and, with the papers on file relating to it, referred to the Committee of Claims; and on the 7th of January, 1834, said bill was reported to the Senate by said committee, without amendment; and on the 8th of January was read a third time and passed. On the next day it was sent to the House of Representatives for their concurrence, and on the same day it was taken up in the House of Representatives and referred to the Committee of Claims; but no report at that session appears to have been made thereon by said committee. At the 1st session of the 24th Congress said claim was again presented to the House of Representatives, and referred to the Committee of Claims; and on the 17th of May, 1836, said committee made an unfavorable report thereon, which was ordered to lie on the table.

Since which, additional information has been received by the committee, which obviates, in some degree, the previous objections to the claim. It now appears that Colonel Abert, of the topographical engineers, was the officer of the Government under whose immediate superintendence the survey was made and the plan devised for the improvement hereinbefore stated; and he now states that in the year 1826, with a view to the improvement of the navigation, he made the survey of the Kennebeck river, which led to the improvement under consideration; that he carefully examined this sunken rock, as well as the half-tide rock; that the sunken rock extended across the channel at Lovejoy's narrows, and at low tide rose within a few feet of the surface of the water; that he sounded on and about the rock; that the water upon each side of it was deep, and the current over and about it rapid, and, though his search was extended for the purpose of ascertaining the obstructions necessary to be removed, he did not discover these "broken fragments" or rocks; that the plan for the improvement was entirely successful, and its practical results beneficial and satisfactory.

The committee are also informed by an honorable member of the House of Representatives, who is acquainted with the locality, that these "broken fragments" or newly-discovered rocks were found, during the progress of the work, at a distance of from 60 to 80 feet from the main or sunken rock of which they were *supposed* originally to have been a part; and the committee are of opinion that it is not at all certain that they were fragments of the sunken rock.

It will readily be perceived that this agreement is not entirely free from ambiguity; and, though the main object of the parties may be clearly comprehended from the whole instrument taken together, yet it will be

found that, by giving a literal interpretation to several of the clauses therein contained, without reference to others, burdens not contemplated by either of the contracting parties will be cast upon the petitioner, and a valuable public improvement made, without any consideration paid therefor. Hence the necessity of resorting to those rules of construction which now prevail in judicial tribunals, when adjudicating upon the rights of individuals, arising upon contracts of this kind. For the purpose of giving the appropriate construction to the contract now under consideration, a brief reference, the committee apprehend, will be sufficient to show the practice which now universally prevails in such cases.

It is said by Pothier, in his Treatise on Obligations, (and he is fully supported by commentators in our own country,) that "courts of law and equity, in construing a contract or agreement, will examine into the common intent and meaning of the contracting parties." Again, he says, "Where the terms of a contract are capable of two significations, we ought to understand them in the sense which is most agreeable to the nature of the contract." He further states, that "one clause ought to be interpreted by the others contained in the same contract, whether they precede or follow it."

With the aid of these rules, there is little difficulty in arriving at the common intent and meaning of the contracting parties, and giving to this contract its appropriate interpretation. The object of it was the improvement of the navigation of the Kennebeck river at Lovejoy's narrows, so as to secure a depth of ten feet water at the lowest ebb in said stream over this obstruction. By said contract, the petitioner, in substance, agreed to accomplish this object, and to remove or reduce this rock, so that there should not be less than ten feet water over it at the lowest low tide in the summer season, and that the fragments of said rock should also be removed, so as to secure over them the same depth of water. This, the committee apprehend, is the substance of the several clauses combined, and conveys the understanding of the parties at the time, and manifestly embraces the object which they had in view. If this is a correct exposition of said contract, and if the inferences from the facts exhibited are correctly drawn, then, by the application of the rules of construction hereinbefore referred to, the petitioner was under no obligation, either legal or equitable, to remove the newly-discovered rocks; for the manifest reason, that their removal was not embraced within it. The author of the aforesaid treatise adds: "However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of."

There is, then, this last-mentioned rule of construction involved in this inquiry, the application of which to this case is equally controlling in favor of the petitioner. At the time this contract was made, there were two certain rocks known, which formed obstructions to the successful navigation of this river, and were known as the "half-tide rock" and "the sunken rock;" the latter of which is the rock that existed at Lovejoy's narrows, and is the subject of this report. This sunken rock, extending across the channel, rose so near the surface of the water at low tide as not to admit the passage of vessels of any considerable burden over it. It was to remove these obstructions at this particular spot that the contract now under consideration was entered into. No other obstructions were com-

plained of or known ; no other improvement was contemplated by either of the contracting parties ; no other consideration was agreed to be paid than such as was deemed a fair equivalent for the removal of these known and specified obstructions. Applying, then, this rule of construction, which is so just and reasonable, to the case under consideration, and it is quite evident that this contract only comprises these known obstructions, " respecting which it appears that the contracting parties proposed to contract ;" and that the newly-discovered fragments or rocks, which were not known to exist by either of the contracting parties at the time the contract was made, were not embraced in it, however general the terms may be in which the agreement is conceived.

But the disputed points in this case, between the agent of the Government and the petitioner, under the clause in the agreement hereinbefore referred to, have been submitted to, and decided by, the said Edward Swan. How far this proceeding would be inoperative for want of mutuality, is a question which the committee have not thought it necessary to investigate in detail ; it is, however, quite certain, in the opinion of the committee, that though the petitioner possessed the power of binding himself, by the submission to Swan to perform the award which he (Swan) should make in the premises, yet it is not so clear that Grant could bind the Government, by that submission, to perform such award ; and if he could not, then this want of mutuality would furnish a conclusive objection to this whole proceeding. But, though Grant decides that these fragments were originally part of this sunken rock, and, therefore, within the contract, and the petitioner bound to remove them, yet he suggests that the petitioner has an equitable claim upon the Government for their removal ; so that, by giving full effect to this entire proceeding, it is manifest that Swan's opinion was in favor of the specific claim now preferred, and would have decided in favor of it, if the question had been submitted to him.

When the committee take into consideration the language used, and the phraseology of this contract ; the object to be promoted ; the intention of the parties to it, and the entire absence of all motive connected with the removal of these fragments, or newly-discovered rocks ; and when, too, they regard the concurrent testimony of all those under whose immediate observation this improvement was made, (all conspiring in favor of the claim in equity of the petitioner,) and the valuable improvement made in the navigation of this river ; as, also, the entire fidelity with which the whole has been completed ; they cannot resist the conclusion, that, in the distribution of equal and exact justice, the claim of the petitioner cannot be withheld. With these impressions, they ask leave to introduce a bill for the petitioner's relief.

Articles of agreement made and concluded by and between Ebenezer Lobdell, of Plympton, county of Plymouth, and State of Massachusetts, on the one part ; and Peter Grant, of Hallowell, in the county of Kennebeck, State of Maine, agent for the Government of the United States of America, on the other, in manner and form following, to wit :

The said E. Lobdell, for the consideration hereinafter mentioned, does, for himself, his heirs, executors, and administrators, covenant with the

said Grant, in his said capacity as agent, and his successor or successors, that he shall and will remove the half-tide rock and the sunken rock, (so called,) lying in Lovejoy's narrows, in the Kennebeck river, below the two dry ledges, with all their parts and fragments; so that there shall not be less than ten feet of water at the lowest low tide in the summer season over either of said rocks.

And the said E. Lobdell further covenants and agrees that he will remove all parts and fragments which he may detach from the half-tide rock out of said Lovejoy's narrows; and that he will not leave any fragment of either rock, which may be detached by him, in any place in said river where vessels do or are liable to anchor, and where there is not ten feet of water at the lowest low water in the summer season. The said E. Lobdell covenants, first, to commence the removal of the sunken rock, (so called,) as soon as the water is sufficiently low in the Kennebeck river to authorize the commencement of the work, and to proceed with all possible despatch, so that, if practicable, it can be finished during the present summer. The said Lobdell reserves to himself the right of relinquishing and abandoning the work aforesaid, after having made a thorough and fair trial of the practicability of removing said rocks, by relinquishing all claims for his services and expenses for what he may have done, provided he does not leave the rocks or their fragments in a worse and more dangerous situation for vessels sailing up or down the said Kennebeck river than they now are, and provided he does not commence the work upon the half-tide rock so as to lower its present height, without a reasonable expectation that it can be lowered as above stated, and the object can be fully accomplished.

And the said Grant, as agent aforesaid, on his part, covenants that, as soon as the sunken rock, which is first to be removed, shall be reduced, and the work upon said rock completed as above stipulated, and to the acceptance of Edward Swan, Esq., of Gardiner, in the county of Kennebeck aforesaid, to pay to the said E. Lobdell fifteen hundred dollars; and, as soon as the half-tide rock shall be removed, reduced, and completed, as aforesaid, and to the acceptance of said Swan, the said Grant covenants, in his capacity aforesaid, to pay to the said E. Lobdell five thousand and five hundred dollars in addition to the above sum.

The parties mutually further covenant that, if any question or dispute concerning the premises should arise between them, during the progress of the work, or at its completion, the same shall be referred to, and decided by, the said Swan, the umpire mutually chosen, whose decisions shall be final.

To the true and faithful performance of the several articles and agreements aforesaid, the said E. Lobdell and the said Grant, as agent aforesaid, do hereby respectively bind themselves, each to the other, in the penal sum of ten thousand dollars.

In witness whereof, we have hereunto set our hands and seals this thirtieth day of May, anno Domini eighteen hundred and twenty-nine.

EBNR. LOBDELL, [SEAL.]
PETER GRANT, Agent. [SEAL.]

Signed and sealed in presence of
SAMUEL C. GRANT.

and Grant, in his said capacity as agent, and his successor or successors, shall and will remove the half-tide rock and the sunken rock, (so called) lying in Lover's narrows, in the Kennebec river, below the two waterfalls, with all their parts and fragments; so that there shall not be any obstruction of water at the lowest low tide in the summer season.

And the said E. Lobdell, further covenants and agrees that he will remove all parts and fragments which he may detach from the half-tide rock, and said Lover's narrows; and that he will not leave any fragment of either rock, which may be detached by him, in any place in said river, where vessels do or are liable to anchor, and where there is not sufficient depth of water for low water in the summer season. The said E. Lobdell covenants and agrees to remove the rock of the sunken rock, (so called), as soon as the water is sufficiently low in the Kennebec river to enable him to remove it, and to proceed with all possible dispatch, so that it may be removed during the present summer season. The said Lobdell covenants to himself the right of removing and taking away the work material, after having made a thorough and fair trial of the practicability of removing said rock, by relinquishing all claims for his services and expenses for what he may have done, provided he does not leave the rock or its fragments in a worse and more dangerous situation for vessels sailing up or down the said Kennebec river than they now are, and provided he does not commence the work upon the half-tide rock so as to lower its present height without a reasonable expectation that it can be lowered as here stated, and the object can be fully accomplished.

And the said Grant as aforesaid, on his part covenants that as soon as the said rock, which is first to be removed, shall be reduced, and the work upon said rock completed as above stipulated, and to the satisfaction of E. Lobdell, or his agent, in the county of Kennebec, aforesaid, he will pay to the said E. Lobdell fifteen hundred dollars; and as soon as the said rock shall be removed, reduced, and completed as aforesaid, and to the satisfaction of said E. Lobdell, he will pay to the said E. Lobdell five hundred dollars in addition to the above sum.

The parties mutually further covenant that if any question or dispute arises during the progress of the work, the parties should refer the same to be referred to and decided by the said E. Lobdell, the parties mutually covenants that the said E. Lobdell shall be bound by his decision.

To the true and faithful performance of the several articles and covenants aforesaid, the said E. Lobdell and the said Grant as agent aforesaid, do hereby respectively bind themselves, each to the other, in the penal sum of ten thousand dollars.

In witness whereof, we have hereunto set our hands and seals this 11th day of May, anno Domini eighteen hundred and twenty-nine.

PETER GRANT, Agent.
E. LOBDELL, Agent.

Witness and sealed in presence of
Samuel C. Graves.